

No. 83-1626
SUPREME COURT OF THE UNITED STATES
October Term, 1983

GREGORY LYNN JOHNSON,
Petitioner,

v.

THE STATE OF MONTANA,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

Brief in Opposition to Petition
for Writ of Certiorari

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QUESTION PRESENTED FOR REVIEW

Whether, under the circumstances of this case, the Montana Supreme Court properly applied the Neil v. Biggers totality of the circumstances test.

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OPINIONS BELOW

The respondent State of Montana accepts the description of the Opinions Below as stated by the petitioner with the addition that the opinion of the Montana Supreme Court which is challenged by petitioner is reported at 674 P.2d 1077 (Mont. 1984).

JURISDICTION

This court is without jurisdiction to review this cause pursuant to 28 U.S.C. § 1257 because the challenged judgment of the Montana Supreme Court does not constitute a final judgment within the meaning of that statute.

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STATEMENT OF THE CASE

The respondent State of Montana accepts the statement of the case as provided by petitioner Johnson with the following additions and deletions:

1. The only question presented to the Montana Supreme Court below was whether the trial court properly applied the Neil v. Biggers analysis to the facts of this case. At no time was the question as to whether the Neil v. Biggers analysis properly applies to voice identification either raised to or considered by the Montana Supreme Court. That issue was not the subject of the Montana Supreme Court's decision and is therefore not properly before this Court even assuming that the judgment was final.

2. The appeal of the trial court's grant of Johnson's motion to suppress the voice identification occurred pursuant to a right of interlocutory appeal granted solely to the State by section 46-20-103(2)(e), Mont. Code Ann. Johnson had no corresponding statutory right to appeal an interlocutory order denying such a motion.

3. The facts of this case were found by the Montana Supreme Court to be substantially as reported by petitioner with some additions which are here noted. Mrs. Jennings, the victim, observed her assailant for 20 minutes before her eyes were taped. 674 P.2d at 1080, B-11^{1/}.

1/ Letter references are to the documents appended to Johnson's petition for a writ of certiorari.

She described her assailant as male, approximately 5'6" in height, wearing brown scratched shoes, blue jeans, blue hooded sweatshirt, dark curly hair, hazel eyes with long eyelashes, strong garlic smell on his breath, a heavy smell of aftershave, and a soft, hesitating voice.

Id. This description was found to be accurate by the trial court and by the Montana Supreme Court in reliance on the trial court's determination. A-8; 674 P.2d at 1080, B-12.

The victim also described the gun as being black or blue with ridges on a six-inch barrel and the "trigger as cocked." She described the knife as a hunting knife with a light-colored handle and a blade that was straight on the top with a curved cutting edge and with tape attached to the blade. Tr. 14.

4. Mrs. Jennings listened to the suspect's voice at the sheriff's office for approximately five minutes. She stated that she had talked with her assailant for approximately 30 minutes, always in close proximity, with him on top of her for much of that time. 674 P.2d at 1080, B-12. She also testified that she was paying close attention to the voice of her assailant. Id.

5. Mrs. Jennings' identification of petitioner at the time of the confrontation was quite certain. She said that she could identify the voice, that it was "extremely similar" to that of her assailant and concluded by saying, "I would say it was the same voice." 674 P.2d at 1081, B-15. At the suppression hearing she summarized her impression of the voice at the time of confrontation as

"identical" to the voice of her assailant. 674 P.2d at 1081, B-13.

6. The trial court found the identification somewhat equivocal, but also indicated it was sufficiently reliable to be admissible. That court, however, suppressed the evidence because it held exigent circumstances were necessary to justify the suggestive procedure, and none were found. A-8, 9, 12.

7. The Montana Supreme Court conceded that the procedure used was unnecessarily suggestive, but applied the totality of the circumstances test of Manson v. Brathwaite, 423 U.S. 98 (1977), Neil v. Biggers, 409 U.S. 168 (1972), and State v. Pendergrass, 179 Mont. 106, 586 P.2d 691 (1978). Pendergrass was an earlier voice identification case in which the Montana Court applied the

Biggers - Manson analysis and found the voice identification evidence insufficiently reliable to be admissible. In this case, however, the Montana Court held that there were sufficient indicia of reliability to permit the evidence to be admitted.

SUMMARY OF ARGUMENT

The decision for which review is sought under this petition is an order of the Montana Supreme Court reversing a pre-trial order of the trial court which had granted a motion to suppress identification evidence. Such an order in a criminal case does not constitute a final judgment over which this Court has review jurisdiction. 28 U.S.C. § 1257. Additionally, the first question as presented to this Court for review in the petition was never presented to the trial

court or the Montana Supreme Court and was not the subject of the Montana Court's opinion. That question, i.e., whether the Neil v. Biggers totality of the circumstances analysis should be applied to voice identification, is not properly before this Court even assuming finality of the judgment. There are no policy considerations which would favor review by this Court of the remaining questions raised. This Court has established a due process test which applies generally to "identification" evidence. That test was scrupulously applied by the Montana Supreme Court. Petitioner has raised no important question of federal law which has not already been settled by this Court. The petition should be denied.

ARGUMENT

I. THIS COURT IS WITHOUT JURISDICTION
TO REVIEW THE OPINION OF THE MONTANA
SUPREME COURT IN THIS CASE.

The jurisdiction of this Court to review a state court judgment by way of appeal or certiorari is limited under 28 U.S.C. § 1257 to "final" judgments or decrees of the highest court of the state. While the opinion challenged by petitioner is that of the Montana Supreme Court, concededly the highest court of the state, it does not constitute a final judgment under 28 U.S.C. § 1257.

The requirement of finality under § 1257 is not interpreted as completely identical with the final judgment requirement of 28 U.S.C. § 1291 governing review of federal court judgments. Different policy considerations govern review of decisions arising in the two systems. Considerations of comity and

federalism play an important role where a state judgment is the subject of review. See Moore's Federal Practice § 508.01[9] (2d ed. 1982). The principles governing the reviewability of an order granting or denying a pre-trial suppression order in a criminal case are similar, however. Cases decided under 28 U.S.C. § 1291 provide guidance and indicate that the opinion currently being challenged is not a final judgment over which this Court has review jurisdiction.

This Court has held that "[a]dherence to the rule of finality [is] particularly stringent in criminal prosecutions because 'the delays and disruptions attendant upon intermediate appeal' which the rule is designed to avoid 'are especially inimical to the effective and fair administration of the criminal law.'" Abney v. United States,

431 U.S. 651, 657 (1977), citing DiBella v. United States, 369 U.S. 121, 126 (1962), and Cobbledick v. United States, 309 U.S. 323, 324-26 (1940). Generally, a judgment in a criminal case is not considered final until guilt has been determined and sentence imposed. Bateman v. Arizona, 429 U.S. 1302 (1976) (per J. Rehnquist as Circuit Justice); Parr v. United States, 351 U.S. 513, 518 (1956); Berman v. United States, 302 U.S. 211, 212 (1937).

A decision to grant or deny a pre-trial motion to suppress has consistently been viewed by this Court as interlocutory and not final, prohibiting review under 28 U.S.C. §§ 1257 and 1291. DiBella v. United States, 369 U.S. 121 (1962) (pre-indictment orders regarding suppression are not final judgments); Carroll v. United States, 354

U.S. 394 (1957) (post-indictment, pre-trial order granting motion to suppress is not a final judgment); Cogen v. United States, 278 U.S. 221 (1929) (post-indictment, pre-trial order denying motion to suppress is not a final judgment). Such orders do not fall within any exception to the finality rule and do not constitute decisions which are fairly severable from the criminal trial itself because the disposition of the motion will necessarily affect the conduct and the result of trial. DiBella, 369 U.S. at 127; Cogen, 278 U.S. at 223. The issue remains a part of the criminal prosecution which is in progress at the time the order issues. DiBella, 369 U.S. at 127. A decision regarding a motion to suppress is simply one step in the criminal case prior to trial. Id. at 131. To view the matter otherwise would

cause "serious disruption to the conduct of a criminal trial" and would result in a "truncated presentation of the issue of admissibility." Id. at 129.

It is also the policy of this Court to avoid premature review, particularly when review is sought prior to a determination of guilt, because acquittal of the defendant at the trial on the merits would render review by this Court unnecessary. Denial of the petition at this time permits this Court to avoid making unnecessary constitutional determinations.

II. THE APPLICABILITY OF THE TOTALITY OF THE CIRCUMSTANCES TEST TO VOICE IDENTIFICATION IS NOT PROPERLY BEFORE THIS COURT BECAUSE IT WAS NOT CONSIDERED OR DECIDED BY THE MONTANA SUPREME COURT.

Petitioner Johnson states that the first question for review under his

petition for certiorari is "whether the totality of the circumstances test with respect to suggestive eye-witness identification should be applied to a suggestive voice identification." This question was never presented to the Montana Supreme Court and is not properly a subject of review by this Court, assuming for the sake of argument that the judgment is final.

At the trial court level, Johnson argued that the totality of the circumstances test developed in Neil v. Biggers, 409 U.S. 188 (1972), and Manson v. Brathwaite, 432 U.S. 98 (1977), and applied in State v. Pendergrass, 179 Mont. 106, 586 P.2d 691 (1978), required suppression of the voice identification evidence because the procedure used created a very substantial likelihood of irreparable misidentification. The trial

court evaluated the identification evidence in light of the Biggers-Manson test and found sufficient reliability to permit the evidence to go to the jury (A-6 to 9), but then held the reliability of the identification to be irrelevant because only exigent circumstances would permit an identification made under suggestive procedures to be admitted into evidence. * A-9, 10. Finding no exigent circumstances to justify the suggestive procedure the trial court granted Johnson's motion to suppress. A-12.

An interlocutory appeal was brought by the State of Montana pursuant to section 46-20-103 (2)(e), Mont. Code Ann. The State claimed that the trial court had misapplied the identification due process test as it had been developed by this Court in Manson and Biggers and applied by the Montana Supreme Court in

Pendergrass. Johnson, in the respondent's reply brief, rhetorically asked whether the Manson-Biggers test applied to voice identification evidence. He then answered that question in the affirmative, but argued that a trial court should scrutinize voice identification cases more carefully because, he claimed, aural identification is inherently less reliable than visual identification.

Johnson then went on to argue that the trial court had correctly applied the totality of the circumstances test and had not applied a per se exclusionary rule. He further argued that the trial court's findings were entitled to great deference. At no time did Johnson argue to the Montana Supreme Court, as he does to this Court, that voice identification obtained through suggestive procedures

should be per se inadmissible. That question was never considered or decided by the Montana Supreme Court and is not a proper subject for review by this Court.

III. THIS PETITION PRESENTS NO ISSUES WORTHY OF CONSIDERATION BY CERTIORARI.

Johnson claims that his petition deserves consideration by this Court because it raises a question of federal law which has not been, but should be, settled by this Court, citing Rule 17.1(c) of the rules of this Court. In fact, the only federal question arguably raised by the petition has already been settled by this Court.

A. This Court Has Already Established the Due Process Test Under Which Identification Evidence Obtained Through Unnecessarily Suggestive Procedures May Be Admitted.

In his petition, Johnson argues that a different test should be applied to

voice identification evidence than is applied to visual identification evidence. He argues that the due process test established by the Manson-Biggers cases applies to visual identification evidence only.

In fact, both Biggers and Manson expressly deal with "identification" evidence in general and neither is limited to visual identification evidence. The issue as framed by this Court in Manson was "whether the Due Process Clause of the Fourteenth Amendment compels the exclusion, in a state criminal trial, apart from any consideration of reliability, of pretrial identification evidence obtained by a police procedure that was both suggestive and unnecessary." 432 U.S. at 99. That case rejected the per se exclusionary rule which Johnson now advocates as

unnecessary and as not mandated by the Due Process Clause. The more lenient "totality of the circumstances" approach was adopted. That test evaluates both the impact of the suggestive procedure and other indicia of reliability to determine whether identification evidence obtained through suggestive procedures may nevertheless be sufficiently reliable to be presented to the jury.

Both Manson and Biggers expressly apply to identification evidence in general. Biggers involved both voice and visual identification, as did Stovall v. Denno, 388 U.S. 293 (1966), and United States v. Wade, 388 U.S. 218 (1967). Clearly, this Court intended to establish a method for evaluating the reliability of identification evidence by a witness irrespective of which of the five senses form the basis for the challenged

identification. This case, notably, involves visual, voice and scent identification. The victim noticed her assailant's dark curly hair, long eyelashes, hazel eyes, his height, and specific details of his dress. 674 P.2d at 1080, B-11. She noticed the strong smell of garlic in his breath and the strong scent of aftershave. Id. She was able to identify the type of aftershave used by her assailant by comparing the smells of a number of different aftershaves. (Tr. 19) She also noticed that he had a soft, hesitating manner of speech. Id.

Johnson would have this Court devise a separate test for each of the senses and a hierarchy of reliability of sense perception. Instead, this Court devised a balancing test which reflects the concern that the jury be presented only

with evidence that has appropriate indicia of reliability, that law enforcement be deterred from using unnecessarily suggestive procedures, and that the administration of justice not suffer unnecessarily from the loss of reliable evidence. Manson, 432 U.S. at 112.

This Court summarized the test which it adopted by concluding that "reliability is the linchpin in determining the admissibility of identification testimony for both pre- and post-Stovall confrontations." Manson 432 U.S. at 114. (Emphasis supplied.) The factors it outlined for consideration in applying the test are easily adapted to any sense perception identification and were properly applied in this case.

B. This Court Has Before It No Credible Evidence From Which It Could Establish That Voice Perceptions Are Less Reliable Than Visual Perceptions.

Johnson claims that aural identification is inherently less reliable than visual identification. This claim was first raised in his respondent's brief to the Montana Supreme Court. It was never presented to the trial court. In support of the claim, Johnson offered the Montana Supreme Court, and now this Court, a 1943 two-page note summarizing a psychological study which never purported to compare the reliability of visual with aural identification and which, on its face, cautions its readers to avoid hasty generalizations from its findings because the study of voice recognition was in its infancy. Note. 33 J. Crim. L. and Criminology 487, 488 (1943).

The cited study offers no information about the ability of a person to recognize an unfamiliar voice seven days after hearing it and involves testing under circumstances very different from those under which the victim was placed in this case. Mrs. Jennings, the victim, spoke with her assailant for approximately thirty minutes. During much of that time he was on top of her or in very close proximity to her. The subjects of the study cited by Johnson, on the other hand, listened to someone standing behind a screen read a fifty-six word paragraph to them once. Such a study can have very little bearing on the reliability of perceptions made under very dissimilar circumstances and substantiated by very accurate observations which utilized the senses of sight and hearing.

This Court has already adopted a workable totality of the circumstances test for determining the admissibility of identification evidence derived from unnecessarily suggestive procedures. That test is workable for all forms of sense perception and identification. This Court has been presented with no credible evidence from which it could even begin to establish a hierarchy of sense perceptions. Such a test would undoubtedly be faulty due to the differences in individuals' abilities to perceive with the various senses. Such matters are best brought out in the individual case and bear on the weight, rather than the admissibility, of the evidence. As this Court pointed out in Manson: "We are content to rely upon the good sense and judgment of American juries, for evidence with some element of

untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature." 432 U.S. at 116.

Johnson's objections are best addressed in the context of the trial by pointing out whatever he believes to be the matters which render the evidence untrustworthy.

IV. THE MONTANA SUPREME COURT CORRECTLY APPLIED THE BIGGERS-MANSON TEST.

A review of the opinion of the Montana Supreme Court which is reported at 674 P.2d 1077 (Mont. 1983) and is also appended to Johnson's petition as Appendix B, carefully reviews the elements of the Biggers-Manson test adopted by this Court. 674 P.2d at 1079,

B-5 to 9. The Montana Court then reviewed the facts of this case under each element of the Biggers-Manson criteria and concluded that the reliability of the evidence was high despite the suggestive procedures. 674 P.2d at 1080-81, B-11 to 17. In each instance the Montana Court found the elements of the Biggers-Manson test to be satisfied and its holding as to each element is supported by factual evidence presented to the lower court.

Johnson disputes the factual findings of the State Supreme Court and contends that the identification at the time of the confrontation was too equivocal to be admitted. Clearly, as Johnson's attorney demonstrated at the suppression hearing, he is very capable of presenting the jury with any uncertainty which might be present in that identification through cross-

examination. This Court has rejected the per se rule which Johnson espouses because it imposes too severe a sanction on the administration of justice. It is understandable that Johnson would like to have this evidence excluded, but he would like to have it excluded for precisely the same reason that it should be admitted: It is accompanied by strong indicia of reliability.

CONCLUSION

This Court has no jurisdiction to review an order denying a motion to suppress evidence in a criminal prosecution because such an order is interlocutory and does not constitute a final judgment over which this Court has review jurisdiction. Additionally, Johnson is attempting to obtain review of

a question that was not presented to either the trial court or the Montana Supreme Court. That question, i.e., whether the totality of the circumstances test applies to voice identification, has already been decided by this Court contrary to Johnson's position. This Court has established the due process test which applies to all forms of witness identification evidence derived from an unnecessarily suggestive identification procedure. That test was properly applied in this case. Johnson has presented this Court with no issue which is worthy of review by certiorari.

Respectfully submitted this 2nd day
of May, 1984.

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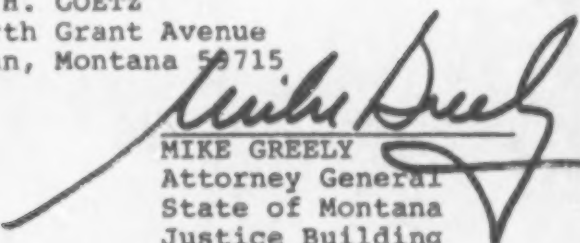
AFFIDAVIT OF SERVICE

STATE OF MONTANA)
 : ss
County of Lewis and Clark)

Mike Greely, being duly sworn, upon
oath deposes and says: That I have served
the foregoing "Brief in Opposition to
Petition for Writ of Certiorari" upon
all parties by causing three (3) copies


thereof to be sent by first class U.S.
mail, postage pre-paid, on May 2, 1984,
to the following:

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SUBSCRIBED AND SWORN to before me this
2nd day of May, 1984.


Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires March 1, 1987